

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE**

**RESERVED ON: 23.06.2026
DELIVERED ON: 10.07.2026**

**PRESENT:
THE HON'BLE MR. JUSTICE GAURANG KANTH**

AP 79 OF 2025

LIPIKA GHOSH

VS

M/S GREAT ISLAND DEVELOPMENT COMPANY AND ORS

Appearance: -

**Mr. Abhilash Chatterjee, Adv.
Ms. Najmee Parveen, Adv.**

..... for the Petitioner

**Mr. Supriyo Das, Adv.
Mr. Aman Baid, Adv.
Mr. Avishek Chatterjee, Adv.**

..... for the Respondents

JUDGMENT

Gaurang Kanth, J. :-

- 1.** The petitioner has preferred the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying for the constitution of the arbitral tribunal to adjudicate and resolve the disputes and differences which have arisen between the parties out of a registered development agreement dated 27.06.2019.
- 2.** The facts leading to the present case are as follows:
- 3.** The Petitioner is one of the co-owners of a piece and parcel of bastu land admeasuring about 5 cottahs 8 chittaks together with structures standing thereon, situated within Ward No. 45 of the Howrah Municipal Corporation,

P.S. Jagacha, District Howrah. The said property originally belonged to Siddheswar Dutta and Sankari Prasad Dutta by virtue of a registered deed of sale dated 05.08.1967. Upon the demise of the original owners and their successors, the Petitioner along with the perform respondents (respondent No. 2&3) became the joint owners and occupiers of the said property and caused their names to be mutated in the relevant municipal and settlement records.

4. The respondent No.1, being the developer, approached the owners with a proposal for development of the said property by construction of a multi-storied residential building. Pursuant thereto, the parties executed a registered development agreement dated 27.06.2019. Simultaneously, a registered power of attorney was executed in favour of the respondent No.1 to facilitate development of the property and sale of the developer's allocation.
5. Under the terms of the development agreement, the respondent No.1 was required to obtain sanction of a G+4 building plan and, upon obtaining such sanction, to pay a sum of Rs.33,34,000/- towards the petitioner's owner's allocation. The agreement further contemplated completion of the construction within two years from the date of sanction of the building plan. At the time of execution of the agreement, the respondent No.1 paid an amount of Rs.2,00,000/- to the petitioner. Subsequently the respondent No. 1 paid further sum of Rs. 50,000/-and Rs. 1,00,000/- vide two separate cheques dated 27.08.2021 and 28.08.2021 respectively.
6. Disputes subsequently arose between the parties. According to the petitioner, instead of obtaining sanction for a G+4 building as contemplated under the agreement, the respondent No.1 obtained sanction

only for construction of a G+2 building, completed the construction thereunder and handed over possession of the flats to the intending purchasers. It is alleged that despite completion of the project, the respondent No.1 failed and neglected to pay the balance owner's allocation amounting to Rs.29,84,000/-. The petitioner contends that the respondent No.1 was aware from the inception that sanction for construction of a G+4 building could not be obtained and nevertheless entered into the development agreement to the prejudice of the owners.

- 7.** The petitioner claims to have repeatedly approached the respondent No.1 seeking payment of the outstanding owner's allocation amount. The respondent No. 1 contended that its inability to obtain sanction for construction beyond a G+2 structure, coupled with administrative disruptions arising from the Covid-19 pandemic, resulted in delay in performance of its obligations under the development agreement. In this regard, the petitioner issued a legal notice dated 31.05.2023, to which the respondent No.1 replied on 23.06.2023, reiterating the aforesaid stand.
- 8.** The petitioner further alleges that the respondent No.1 falsely disclosed in its income tax return that the entire owner's allocation amount had been paid, whereas only a fraction thereof had actually been disbursed. The petitioner is stated to have lodged representations before the Income Tax Authorities as well as complaints before the police authorities. The petitioner also instituted a civil suit, being Title suit No. 134/2024, before the court of Civil Judge (Junior Division), 6th Court at Howrah seeking declaratory and injunctive reliefs. The said suit was subsequently withdrawn and dismissed as not pressed on 18.03.2025.

- 9.** Clause XIII of the Development Agreement contains an arbitration agreement providing for reference of disputes concerning the interpretation, scope, effect, rights, liabilities and obligations of the parties to arbitration under the provisions of the Arbitration and Conciliation Act, 1996. Invoking the said arbitration clause, the Petitioner, through her Advocate, issued a notice dated 03.04.2025, whereby nominated Mr. Jyoti Prakash Chatterjee, Advocate as her nominee Arbitrator and called upon the respondents to concur in the constitution of the Arbitral Tribunal and to nominate an arbitrator in terms of the agreed procedure. The said notice was received by the respondents on 04.04.2025. However, no arbitrator was appointed by the respondents within the stipulated period, nor was any response furnished to the notice invoking arbitration.
- 10.** In the aforesaid circumstances, alleging failure of the agreed procedure for constitution of the Arbitral Tribunal, the Petitioner has approached this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator for adjudication of the disputes and differences that have arisen between the parties out of and in connection with the registered development agreement dated 27.06.2019.

Submission on behalf of the Petitioner

- 11.** Mr. Abhilash Chatterjee, learned Counsel for the petitioner, submits that a valid, binding and subsisting arbitration agreement exists between the parties in the form of Clause XIII of the registered development agreement dated 27.06.2019. Learned Counsel submits that disputes have arisen between the parties on account of the alleged failure of the respondent No.1 to pay the balance owner's allocation of Rs.29,84,000/- out of the agreed sum of Rs.33,34,000/- and its failure to perform its obligations

under the development agreement. According to learned Counsel, such disputes squarely fall within the scope of the arbitration agreement. It is further submitted that the petitioner duly invoked the arbitration clause by issuing a notice dated 03.04.2025 and nominated an arbitrator on her behalf. Despite receipt of the said notice, the respondents failed to appoint an arbitrator or to respond thereto, resulting in a failure of the agreed procedure for constitution of the arbitral tribunal.

- 12.** Learned Counsel submits that the objections sought to be raised by the respondent No.1 are without merit. It is contended that although the petitioner had earlier instituted Title Suit No. 134 of 2024 before the learned Civil Judge (Junior Division), 6th Court, Howrah, the said suit was subsequently withdrawn and dismissed as not pressed on 18.03.2025. According to learned Counsel, the relief claimed in the said suit was materially different from the relief claimed in the present proceedings. In the said suit, the petitioner had sought recovery of the entire amount of Rs.33,34,000/- without accounting for the payments already received, whereas the present claim is restricted to the balance sum of Rs.29,84,000/- after giving due credit to the amounts admittedly paid by the respondent No.1. It is, therefore, submitted that the present proceedings are founded on a distinct factual basis and seek a distinct relief. Consequently, the principles underlying Order XXIII Rule 1 of the Code of Civil Procedure have no application to the facts of the present case.
- 13.** Learned Counsel further submits that the development agreement cannot be said to have been frustrated as contended by the respondent No.1. It is argued that the respondent No. 1 obtained sanction for a G+2 storied building, proceeded with construction thereon, sold the flats and derived

the benefits of the development agreement. Having acted upon and substantially performed the agreement, the respondent No.1 cannot now contend that the contract stood frustrated merely because sanction for construction of a G+4 storied building was not obtained. In any event, the petitioner's claim for the owner's allocation survives and remains enforceable, particularly when the constructed units have already been sold and the promised consideration has not been fully paid.

- 14.** In support of the aforesaid submissions, learned Counsel for the petitioner places reliance upon the decisions of the Hon'ble Supreme Court in ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath***, reported as **AIR 1968 SC 522**, and ***National Agricultural Cooperative Marketing Federation of India Ltd. v. Gains Trading Ltd.***, reported as **(2007) 5 SCC 692**, to contend that an arbitration agreement is a collateral and independent covenant which survives allegations of frustration, breach or non-performance of the underlying contract. It is accordingly submitted that the arbitration agreement remains valid and enforceable, the disputes are live and arbitrable, and this Court may exercise its jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 and appoint an arbitrator for adjudication of the disputes and differences between the parties.

Submission on behalf of the Respondent

- 15.** Mr. Supriyo Das, learned Counsel appearing on behalf of the respondent No.1, submits that the present petition is not maintainable in view of the conduct of the petitioner in having earlier instituted Title Suit No. 134 of 2024 before the Court of the Civil Judge (Junior Division), 6th Court at Howrah, arising out of the very same registered development agreement

dated 27.06.2019. Learned Counsel submits that the said suit was subsequently withdrawn and dismissed as not pressed by an order dated 18.03.2025 without any liberty being sought for or granted to institute any fresh proceeding on the same cause of action. According to learned Counsel, the disputes raised in the present petition emanate from the same development agreement and the same alleged failure on the part of the respondent no.1 to discharge its obligations thereunder, and therefore the petitioner is precluded from re-agitating the same dispute in a different forum or by way of a different proceeding.

16. Learned Counsel contends that the principles underlying Order XXIII Rule 1 of the Code of Civil Procedure, 1908 are founded upon public policy and are intended to prevent multiplicity of proceedings and forum shopping. It is submitted that once a litigant abandons a proceeding unconditionally and without reserving liberty to initiate fresh proceedings, such litigant cannot thereafter institute another proceeding founded on the same cause of action. According to learned Counsel, mere variation in the quantum claimed or the manner in which the relief is framed cannot alter the essential nature of the dispute, the root cause of action remaining the same.
17. In support of the aforesaid submissions, learned Counsel places reliance upon the decision of the Hon'ble Supreme Court in **HPCL Bio-Fuels Ltd. v. Shahaji Bhanudas Bhad**, reported as **2024 SCC OnLine SC 3190**. Referring to the said judgment, it is submitted that the Hon'ble Supreme Court has held that the principles underlying Order XXIII Rule 1 CPC are applicable even to proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996, and that a party who has withdrawn an earlier

proceeding without liberty cannot subsequently initiate fresh proceedings founded on the same cause of action. Learned Counsel submits that the Hon'ble Supreme Court has further observed that proceedings under Section 11 are not merely for appointment of an arbitrator but constitute the commencement of the arbitral process itself, and therefore the abandonment of an earlier proceeding may operate as a bar against a subsequent proceeding founded on the same dispute.

18. It is, therefore, submitted that the present petition is barred by the principles underlying Order XXIII Rule 1 of the Code of Civil Procedure, 1908, since the earlier suit and the present petition arise out of the same development agreement and the same alleged failure on the part of the respondent No.1 to make payment of the owner's allocation thereunder. Learned Counsel, accordingly, submits that the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable and is liable to be dismissed.

19. Learned Counsel appearing for the respondent No. 1, on merits, submits that as per the terms and conditions of the registered development agreement dated 27.06.2019, the petitioner is entitled to receive her balance share of the monetary allocation only upon obtaining the second sanction, that is, the sanction plan for the G+4 storied building, and not prior thereto. He submits that as on date, only the first sanction plan for a G+2 storied building has been obtained by the respondent No.1 in respect of the schedule mentioned property, and the sanction plan for the G+4 storied building, being the second and final sanction contemplated under the said development agreement, is yet to be obtained. He further submits that it is only upon the said second sanction being granted by the

competent authority that the contingency for disbursement of the balance monetary allocation in favour of the Petitioner would arise and crystallise, and since the said stage has not yet been reached, the obligation of the respondent to disburse the balance amount has not yet accrued, and consequently, no dispute, in the legal sense, can be said to have arisen between the parties as on date warranting reference to arbitration.

Legal Analysis

- 20.** This Court has heard the arguments advanced by the learned counsel appearing for the parties and has examined the documents and judgments relied upon by them.
- 21.** The principal objection raised by the respondent No. 1 pertains to the maintainability of the present petition, on the ground that the petitioner had earlier instituted Title Suit No. 134 of 2024 before the Learned Civil Judge (Junior Division), 6th Court at Howrah, arising out of the same development agreement dated 27.06.2019, and had subsequently withdrawn the said suit without obtaining liberty to institute a fresh proceeding. It is the contention of the respondent No. 1 that the present petition is barred by the principles underlying Order XXIII Rule 1 of the Code of Civil Procedure, 1908.
- 22.** In order to examine the aforesaid contention, it becomes necessary to first examine the prayers made in the said Title Suit No. 134 of 2024. The petitioner has placed the said plaint of the said suit on record by way of a supplementary affidavit. The prayers made in Title Suit No. 134 of 2024 read as follows:

1. *“A decree of declaration that the plaintiff/owner is entitled to get her owner's allocation share sum of Rs. 33,34,000/- as per registered development agreement dated 27.06.2019 registered before the office of DSR-II, Howrah, vide being Deed No.*

051303364/2019, Volume No. 0513-2019, Book No. 1, Pages No. 109864 to 109893.

2. *A decree of declaration that the present multistory structure standing upon the "A" Schedule property is unauthorised and illegal, without sanction by Howrah Municipal Corporation, Howrah and further declare to give demolition order to HMC, Howrah, Defendant No. 3 of the unauthorised portion/area of the present multistoried building structure standing upon Schedule 'A' Property.*
3. *A decree of declaration restraining the Defendant No. 3 or its men and agents from transferring or alienating any portion of the property mentioned and described in the Schedule 'A' as a whole.*
4. *A decree of temporary injunction restraining the defendant No. 1 & 2 or its men and agents from transferring or alienating any portion of the property mentioned and described in the Schedule 'A' as a whole or carrying on any constructional development/construction work during the pendency of this suit over the suit property.*
5. *Cost of suit.*
6. *Any other equitable relief."*

23. The petitioner subsequently filed an application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908, seeking withdrawal of the said suit without any liberty to institute a fresh suit on the self-same cause of action. By order dated 18.03.2025, the learned court allowed the said prayer, and the petitioner accordingly withdrew the said suit without any liberty to institute a fresh suit on the self-same cause of action.
24. It is the contention of respondent No. 1 that since the petitioner has already withdrawn the suit arising out of the development agreement dated 27.06.2019, in respect of the grant of owner's allocation, the petitioner cannot raise the same grievance before the Arbitral Tribunal, inasmuch as the suit and the present claim arise out of the same cause of action, the only difference being the forum of adjudication.
25. This Court is unable to accept the said contention. The present proceeding is not one for adjudication of claims but merely for constitution of the arbitral forum. The Court is therefore not required to determine whether a particular claim would ultimately be maintainable before the Tribunal. The

withdrawal of the suit may furnish a defence before the Tribunal regarding the maintainability of any particular claim, but cannot extinguish the arbitration agreement itself. At this stage, this Court is merely called upon to constitute an Arbitral Tribunal for adjudication of the disputes between the parties. It would, therefore, be premature for this Court to examine whether the claim which the petitioner intends to pursue before the Tribunal would be barred by principles of *res judicata*, or otherwise.

- 26.** Respondent No. 1 has placed reliance upon **HPCL Bio-Fuels Ltd.** (supra) in support of its contention. However, a careful reading of the said decision reveals that the Hon'ble Supreme Court was concerned with a situation where an earlier application under Section 11(6) of the Arbitration and Conciliation Act, 1996, had itself been withdrawn unconditionally, and a subsequent Section 11(6) application founded on the same cause of action was thereafter instituted. It was in that specific context that the Hon'ble Supreme Court held that the principles underlying Order XXIII Rule 1 of the Code of Civil Procedure, 1908, could be extended to proceedings under Section 11(6) of the Act. The factual matrix of the present case stands on an entirely different footing. In the present case, the earlier proceeding was a civil suit seeking declaratory and injunctive reliefs before a competent civil court, whereas the present proceeding is an application under Section 11(6) of the Act of 1996 seeking constitution of an Arbitral Tribunal in terms of the contractual dispute resolution mechanism agreed upon between the parties. The nature, object, forum, and reliefs involved in the two proceedings are thus fundamentally distinct, and the ratio of **HPCL Bio-Fuels Ltd.** (supra) does not, therefore, govern the facts of the present case.

- 27.** It is also significant to note that the arbitration agreement contained in Clause XIII of the development agreement has not been disputed by the respondent No.1. The notice invoking arbitration dated 03.04.2025, was admittedly received by the respondents, however, no steps were taken towards constitution of the Arbitral Tribunal in accordance with the agreed procedure. Consequently, the jurisdictional requirement contemplated under Section 11(6) of the Act stands fully satisfied.
- 28.** The further contention of the Respondent No.1 that the development agreement has become frustrated is, at this stage, equally unpersuasive. Admittedly, sanction for a G+2 structure was obtained, construction was undertaken, and units in the developed property were sold. Whether the respondent was justified in not obtaining sanction for a G+4 structure, whether the doctrine of frustration is at all attracted in the facts of the present case, and whether the petitioner remains entitled to the balance owner's allocation, are all disputes arising out of and in connection with the development agreement. Such issues pertain to the merits of the rival contentions of the parties and fall squarely within the domain of the Arbitral Tribunal.
- 29.** The decisions of the Hon'ble Supreme Court in ***Naihati Jute Mills Ltd.*** (supra) and ***National Agricultural Cooperative Marketing Federation of India Ltd.*** (supra) reiterate the settled principle that an arbitration agreement is a collateral and severable covenant which survives allegations of frustration, breach, or non-performance of the underlying contract. The defence of force majeure or frustration, therefore, does not extinguish the arbitration agreement, but itself constitutes a dispute to be adjudicated through arbitration.

- 30.** At the stage of consideration of a petition under Section 11(6) of the Act, the scope of examination by this Court is limited. Once the existence of a valid arbitration agreement and the failure of the agreed appointment procedure stand established, issues touching upon the merits of the claims, the applicability of the doctrine of frustration, the effect of withdrawal of the earlier suit, or any other preliminary or jurisdictional defence, are matters that may appropriately be urged before the Arbitral Tribunal. This Court accordingly finds no legal impediment to the constitution of an Arbitral Tribunal for adjudication of the disputes between the parties.
- 31.** As per Clause XIII of the development agreement dated June 27, 2019, disputes are to be referred to an Arbitral Tribunal consisting of three members. The Petitioner, vide letter dated April 3, 2025, nominated Mr. Jyoti Prakash Chatterjee, Advocate, as her nominee Arbitrator and called upon the respondents to concur in the constitution of the Arbitral Tribunal and to nominate an arbitrator in terms of the agreed procedure. The said notice was received by the respondents on 04.04.2025. However, no arbitrator was appointed by the respondents within the stipulated period, nor was any response furnished to the notice invoking arbitration.
- 32.** Accordingly, Mr. Rohit Das, Adv. (Mob No. 9831916012) is appointed as the Nominee Arbitrator on behalf of the respondents to adjudicate the disputes which have arisen between the parties out of the development agreement dated 27.06.2019, subject to disclosure in terms of Section 12 of the Arbitration and Conciliation Act, 1996.
- 33.** Mr. Jyoti Prakash Chatterjee, Advocate, and Mr. Rohit Das, Advocate are requested to hold a meeting at the earliest and appoint the Presiding

Arbitrator, and thereby constitute the Arbitral Tribunal for adjudication of the disputes between the parties.

- 34.** The remuneration of the Arbitral Tribunal shall be governed by the Fourth Schedule to the Arbitration and Conciliation Act, 1996, or such remuneration as may be fixed by the Learned Arbitrators in consultation with the parties.
- 35.** All questions relating to arbitrability of the dispute, admissibility of the claims, limitation and other issues are kept open to be urged before this learned Sole Arbitrator.
- 36.** The parties are directed to appear before the Learned Arbitrators within four weeks from the date of communication of this order.
- 37.** The present petition is accordingly allowed.

(GAURANG KANTH, J.)

SAKIL AMED P.A